IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1563

MAY 27 1976

MICHAEL RODAK, JR., CLERK

THOMAS W. AHLMAN, and
CAROL ANN AHLMAN, Husband and Wife - Petitioners

versus

CHRISTOPHER DURBIN
c/o Jefferson County Police Department
an Individual
JEFFERSON COUNTY COURT
Honorable Louis J. Hollenbach
Jefferson County Court House
JEFFERSON COUNTY FISCAL COURT
Comprised of
Honorable Louis J. Hollenbach
Judge, Jefferson County
c/o Jefferson County Court House
Honorable Maurice W. Archer
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
Honorable William H. Walden
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
and
JEFFERSON COUNTY POLICE MERIT BOARD
by and Through Its Members
Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF RESPONDENTS IN OPPOSITION

(See inside cover for attorneys)

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BLEED THROUGH

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(Caption continued)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF RESPONDENTS IN OPPOSITION

May it please the Court:

QUESTION PRESENTED

Must the ancient doctrine of sovereign immunity be abrogated and Section 231 of the Kentucky Constitution be declared inoperative by this Court?

CONSTITUTIONAL PROVISION INVOLVED

Kentucky Constitution, Section 231

"The general assembly may, by law, direct in which manner and in what courts suits may be brought against the Commonwealth."

COUNTERSTATEMENT OF THE CASE

On August 9, 1969, at approximately 8:30 p.m., Officer Christopher Durbin was parked in his patrol car in a parking lot at Southside Drive and National Turnpike in Jefferson County, Kentucky. According to all the evidence presented, Officer Durbin, in pursuit of an escaping felon, was fired upon by the felon and returned fire with one shot.

The Petitioner, Carol Ann Ahlman, was apparently struck by one of the two shots fired in the exchange, but there was no direct proof as to who fired the shot injuring Petitioner.

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REASON WHY THE WRIT SHOULD NOT BE GRANTED

The state and Federal Courts of the United States have long accepted and supported the doctrine of sovereign immunity. As this Court recognized in *Cohens* v. *Virginia,* 6 Wheat 264, 5 L. Ed. 257, a state cannot be sued without its consent. This doctrine was expressly incorporated in the Constitution of the United States by the adoption of the Eleventh Amendment in 1798.

The doctrine of sovereign immunity in Kentucky has existed from the beginning of the Commonwealth. Each of the four State Constitutions embodied this principle with minor variations, up to and including the present Section 231 of the 1891 Kentucky Constitution. The Kentucky Courts have continuously upheld the sovereign immunity of counties in a long line of cases. The presently controlling case in Kentucky is *Cullinan* v. *Jefferson County,* Ky., 418 S. W. 2d 407 (1967) which makes clear that a county is a political subdivision of the Commonwealth and is clothed with sovereign immunity.

The Respondents submit that under the considerations governing review on certiorari that are set forth in Rule 19 this Court is compelled to deny the petition. The Petitioners have advanced no "special and important reasons" justifying exercise of this Court's discretionary jurisdiction on certiorari. Even if this is a federal question of substance the decision of the Kentucky Supreme Court is consistent with decisions

of this Court on sovereign immunity. As was stated in *Palmer* v. *Ohio,* 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108 (1918) the right of individuals to sue the state in either a Federal or a state court cannot be derived from the Constitution or laws of the United States, but only from the consent of the state. The Kentucky Constitution properly invokes the doctrine of sovereign immunity, granting to the General Assembly the power to abrogate the doctrine in a manner it finds appropriate. The circumstances before us simply fall outside any area of exception.

As to the collateral contention that the County's purchase of automobile liability insurance serves to deny Petitioners equal protection of the laws, let us point out that the sovereignty may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever justice to the public requires it. *Beers use of Platenius* v. *Arkansas,* 20 How 527, 15 L. Ed. 991 (1858). Unless sovereign immunity is to become an "all or nothing" proposition, the power to accept or reject suit in its own courts must remain with the States' elected representatives.

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CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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